No. 15100.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE ANGUS DAVIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division,

THOMAS H. LUDLOW, JR.,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee,
United States of America.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

STATUTES PAGE

No. 15100.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE ANGUS DAVIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

Jurisdiction.

The jurisdiction of the District Court in this case arose under Title 18, U. S. C. A., Section 2314 (June 25, 1948, C. 645, 62 Stat. 806, amended May 24, 1949, C. 139, Sec. 45, 63 Stat. 96), and Title 18, U. S. C. A., Section 3231 (June 25, 1948, C. 645, 62 Stat. 826).

The jurisdiction of this court was invoked under the provisions of Title 28, U. S. C. A., Section 1291 (June 25, 1948, C. 646, 62 Stat. 929), and Rules 37 and 39 of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A. (As amended Dec. 27, 1948, eff. Jan. 1, 1949).

Statement of the Case.

Appellant was indicted on two counts of violation of 18 U. S. C., Sec. 2314—Transportation of forged security interstate.

Count One charged that:

> "On or about June 28, 1956, defendant, Lee Angus Davis, with unlawful and fraudulent intent, did transport in interstate commerce, namely: from Los Angeles County, California, within the Central Division of the Southern District, to Samson, Alabama, a falsely made and forged security, namely: a check drawn on the Samson Banking Company, Samson, Alabama, payable to Robert A. A. Ladd, in the sum of $6,000.00, and purporting to have been signed by Harry C. Walters; and the defendant then knew said security to have been falsely made and forged."

Count Two provided that:

> "On or about July 21, 1955, defendant, Lee Angus Davis, with unlawful and fraudulent intent, did transport in interstate commerce, namely: from Los Angeles County, California, within the Central Division of the Southern District, to Samson, Alabama, a falsely made and forged security, namely: a check drawn on the Samson Banking Company, Samson, Alabama, payable to Robert A. A. Ladd, in the sum of $6,000.00, and purporting to have been signed by Harry H. Walters; and the defendant then knew said security to have been falsely made and forged."

On December 19, 1955, appellant was sentenced by the Honorable Harry C. Westover, to three years on his plea of guilty to Count Two of the indictment. On motion of the Government, Count One was dismissed.

On January 9, 1956, appellant filed his notice of appeal from the judgment of conviction of December 19, 1955, and requested bail pending appeal. Also on January 9, 1956, appellant filed his "pauper's affidavit," which was, in effect, a petition to Judge Westover for permission to proceed on appeal *in forma pauperis*. From the records of the District Court, it appears that on the same date Judge Westover entered an order denying the petition to proceed *in forma pauperis*. Appellant then applied to this Honorable Court for permission to proceed *in forma pauperis*. By *per curiam* of February 23, 1956, Judge Westover certified in writing that the within appeal is without merit and not taken in good faith, and upon that ground denied the motion of appellant to proceed *in forma pauperis*.

Evidently the existence of Judge Westover's order of February 23rd was not brought to the attention of this Honorable Court, for on March 17, 1956, this Court handed down an order granting appellant leave to proceed *in forma pauperis,* on the ground that the trial court had failed to certify in writing that the appeal was not taken in good faith.

Although ably represented by counsel in the court below, appellant undertakes this appeal *in propria persona*. He has failed to comply with even the most rudimentary requirements of federal appellate practice. He is proceeding *in forma pauperis* when, technically, he should be barred from so proceeding. He has made no designation of record. He has provided no reporter's transcript to complete his record. He has made no formal specification of error, and his "Brief of the Records," filed herein, is written in disconnected, rambling style, and is influenced less by reality than by his peculiar conception of legal euphonics.

However, being mindful of the admonitions of the Supreme Court, and of this Honorable Court, that we are not to demand of a layman and pauper that degree of skill and competence normally expected from a person with legal training,

Tompkins v. Missouri (1945), 323 U. S. 485, 487;

Darr v. Burford (1949), 339 U. S. 200, 203;

Price v. Johnson (1947), 334 U. S. 266, 291;

Cochran v. Kansas (1941), 316 U. S. 255, 257;

Holiday v. Johnson (1940), 313 U. S. 342, 350;

Darcy v. Teets (9th Cir., 1955), Misc. 469;

Thomas v. Teets (9th Cir., 1953), 205 F. 2d 236;

in an effort to aid the court we will consider appellant's position in more detail than would normally be the case.

Appellant's Apparent Specification of Errors.

In common with many "pro pers," appellant does not clearly enumerate the points on which he intends to rely, in attacking the appealed judgment. Appellee has taken the liberty of setting out the following tentative specification of error, since from a consideration of appellant's brief it appears that he assigns the following points as error. References hereinafter are made to appellant's brief (Br.), and the clerk's transcript [Clk. Tr.]:

I.

THE HONORABLE DISTRICT JUDGE WAS BIASED AND PREJUDICED AGAINST THE APPELLANT (Br. 5).

II.

THE HONORABLE DISTRICT JUDGE REFUSED TO ALLOW APPELLANT TO SUBPOENA WITNESSES, IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS (Br. 5).

III.

THE ARRESTING FEDERAL OFFICERS USED ILLEGAL MEANS TO EXTRACT A CONFESSION FROM APPELLANT AND CAUSED HIM TO INCRIMINATE HIMSELF AGAINST HIS WILL, IN VIOLATION OF THE FIFTH AMENDMENT (Br. 5).

IV.

THE APPELLANT'S RIGHTS AGAINST UNREASONABLE SEARCH AND SEIZURE WERE VIOLATED (Br. 5, 14).

V.

APPELLANT WAS WRONGFULLY INDICTED FOR INTERSTATE TRANSPORTATION OF A FORGED SECURITY, INASMUCH AS HE HAD NOT LEFT THE CONFINES OF LOS ANGELES COUNTY FOR THE ENTIRE YEAR OF 1955 (the period in which the offense occurred) (Br. 6, 7, 8, and 9).

VI.

APPELLANT WAS FALSELY ADVISED BY HIS COUNSEL THAT HE WOULD RECEIVE PROBATION IF HE WOULD PLEAD GUILTY TO ONE COUNT OF THE INDICTMENT (Br. 9, 10, and 11).

VII.

THE DISTRICT JUDGE ABUSED HIS DISCRETION BY REFUSING TO ALLOW APPELLANT TO WITHDRAW HIS PLEA OF GUILTY AND ENTER A PLEA OF NOT GUILTY, "TO PROVE HIS INNOCENCE OF THE CHARGES" (Br. 10, and 11).

VIII.

APPELLANT IS ILLEGALLY DETAINED BECAUSE, WHILE HE OFFERED TO PLEAD GUILTY TO COUNT ONE, THE COURT ACCEPTED THE PLEA AS TO COUNT TWO, AND COUNT ONE WAS SUBSEQUENTLY DISMISSED ON MOTION OF THE GOVERNMENT (Br. 13).

Assuming such to be the case, these points will be briefly discussed below.

ARGUMENT.

I.

Judge Westover Was Not Biased and Prejudiced Against Appellant.

This objection appears to be based upon the theory that, by imposing the sentence of December 19, 1956, the District Judge showed his bias against the appellant, thus violating his constitutional rights. *Prima facie,* such contention is absurd. It must be remembered that at all times through sentence in the court below, appellant was represented by retained counsel. Appellant was convicted not by trial but upon his plea of guilty to one count of violation of 18 U. S. C. A., Sec. 2314.

Any attack on the sentence based upon the bias of the Judge must be based, perforce, not upon the manner in which the conviction was obtained, but upon some abuse of discretion on the part of the court in the imposition of the sentence itself. The sentence imposed was three years imprisonment. In view of the fact that the maximum sentence permissible under 18 U. S. C. A., Sec. 2314, is ten years and/or $10,000.00, the sentence imposed was comparatively light. It is of course settled, that where the sentence imposed by the trial court is within the statutory limits, there can be no abuse of discretion. (*James Boyd Brown v. United States* (9th Cir., 1955), 220 F. 2d 293.)

II.

Judge Westover Did Not Violate Appellant's Constitutional Rights by Refusing to Allow Appellant to Subpoena Witnesses.

When appellant pleaded guilty, any need for adducing testimony was at an end. The question of appellant's guilt was determined, and it remained only for the court to impose sentence. The function of the witness had been by-passed by appellant's admission of the ultimate question of guilt. While from the record presently before this court, it is not apparent whether appellant requested that witnesses be subpoenaed, it is, nonetheless, clear that where there is a guilty plea conclusively determining the litigation, the function of the witness is precluded. Thus, even assuming arguendo the alleged denial by the court of subpoena following a plea of guilty, the court acted correctly in this respect.

III.

Appellant Can Not Complain That Federal Officers Here Caused Him to Incriminate Himself in Violation of the Fifth Amendment.

In this objection, appellant charges that the Federal Officers obtained the evidence for conviction by illegal means, and further caused appellant to incriminate himself against his will. It is not specified in what manner appellant was caused to incriminate himself, nor what the illegal means were by which the Federal Officers were alleged to have obtained evidence; however, since, with the advice of counsel, appellant freely entered a guilty plea, it can only be assumed that by this objection appel-

lant conceives that his plea of guilty, in and of itself, is self incriminatory in a manner protected by the Fifth Amendment. Historically, the plea of guilty has been available to an accused throughout the long history of Anglo-Saxon law. Its use long pre-dates the adoption of the United States Constitution. Since it was in use prior to the Fifth Amendment, it does not fall within the purview of the protection of that Amendment. Therefore, the plea of guilty cannot be barred by invocation of the Fifth Amendment.

IV.

Appellant's Rights Against Unreasonable Search and Seizure, Were in No Way Violated.

The gravamen of this objection seems to be that two FBI Agents allegedly entered appellant's home, arrested him without a warrant and searched his premises, seizing sundry personal documents.

As in the foregoing specifications, this objection is not well taken in light of appellant's guilty plea. This is not the usual case where an appellant objects to the admission in the court below, of illegally obtained evidence. The instant conviction was in no way based upon evidence illegally seized or otherwise, but was based, solely upon appellant's plea of guilty to Count Two of the indictment. Even assuming, arguendo, that appellant is correct (and he is not) in his statement that certain of his personal papers were seized without a proper warrant, it is in nowise clear in what way appellant's plea of guilty, and the conviction thereon, is affected by such seizure. Lacking materiality, this ground should be ignored by this Honorable Court.

V.

It Is Not an Essential Element to a Violation of 18 U. S. C., Sec. 2314, That the Accused Personally, Physically Convey a Forged Security in Interstate Commerce.

Appellant erroneously assumes that, in order to predicate a conviction under 18 U. S. C., Sec. 2314, it must be shown that the accused must have personally, physically transported the forged security in question in interstate commerce. Based upon this untenable supposition, he attempts to prove his innocence by showing his unbroken physical presence in Los Angeles County for the entire period in question. Thus, he supplies the names of various persons who will testify to his presence, and demands that this Court order an investigation to substantiate his claims. The fallacy to this position is, of course, that appellant's continued and uninterrupted residence within Los Angeles County during the period of the crime is immaterial, since, as in most statutes of this type, a person may violate the statute if he is the active initiating agency for setting in motion the proscribed transaction. In such a case, it is the interstate scope of the transaction which is essential, and not the physical movement in interstate commerce of the accused. Therefore, appellant's physical presence in Los Angeles County during the "entire year of 1955," was immaterial to the question of whether or not he had caused the prohibited interstate movement. Thus, in *Pereira v. United States* (1954), 347 U. S. 1, 74 S. Ct. 358, 98 L. Ed. ....., Pereira was convicted of a violation of 18 U. S. C., Sec. 2314, in that

he caused a fraudulently obtained check to be transported in interstate commerce. The court stated, at page 9 of the U. S. report:

> "The transporting charge does not require proof that any specific means of transporting were used, or that the acts were done pursuant to a scheme to defraud, as is required for the mail charge. . . . When Pereira delivered the check, drawn on an out-of-state bank, to the El Paso bank for collection, he 'caused' it to be transported in interstate commerce."

A strikingly similar situation was presented in *United States v. Taylor* (2nd Cir., 1954), 217 F. 2d 397, where appellant waived indictment and pleaded guilty to an Information charging him with—

> " 'transporting' in interstate commerce 'falsely made' and 'forged' 'securities' 'with unlawful or fraudulent intent.' "

—all in violation of 18 U. S. C., Sec. 2314. More specifically, appellant was accused of transporting, in interstate commerce, checks drawn on fictitious and non-existent bank accounts, knowing the same to have been falsely made and forged (an almost perfect duplication of the facts in the instant case). Appellant subsequently sought to vacate the resultant conviction, on the ground that the sentence was imposed in violation of the laws of the United States, because the facts alleged were not within the statute. On these facts the court held that the appellant, by cashing checks drawn on the fictitious and non-existent bank accounts in another state, "caused"

such checks to be transported in interstate commerce within the meaning of 18 U. S. C., Sec. 2314.

From the foregoing it is apparent that for the purposes of 18 U. S. C., Sec. 2314, as for other statutes of this type, personal conveyance through interstate commerce is not necessary. It is sufficient if the accused is the activating force behind the scheme. Therefore, appellant's presence or absence in Los Angeles County during the period of the crime is immaterial.

VI.

Appellant May Not Complain of Alleged Misrepresentation by His Retained Counsel.

During the course of the proceedings below, appellant was ably represented by the office of Harrison Dunham, Esq. Said counsel was retained by appellant for his defense. It was on the advice of Mr. Dunham that appellant entered his plea of guilty to Count Two of the indictment.

On this appeal it is apparently appellant's contention that he was misrepresented by Mr. Dunham, in that he was advised by him to plead guilty. Appellant claims he was "falsely advised" (Br. 10) that "said counsel for the defense . . . deliberately deprived the petitioner's constitutional rights and mis-presented the petitioner throughout the entire court proceeding" (Br. 11). Nothing in the record shows that appellant received anything but efficient, able representation by Mr. Dunham. He retained Mr. Dunham for his defense, and was represented by him at his arraignment [Clk. Tr. 3] and at

each of the succeeding five hearings culminating in the conviction and sentence of December 19, 1955 [Clk. Tr. 4, 7, 8, 9, 10]. There is nothing herein to even so much as intimate that Mr. Dunham's advice to appellant was anything but sagacious and sound. On the contrary, the very nature of some of the grounds of ostensible defense, raised here by appellant, tend to justify such advice.

Appellant received all the Constitution guarantees him in the matter of a regular proceeding and representation by counsel. Even where counsel does err (and we are quick to say here that we feel that Mr. Dunham did not), it is established that a defendant is bound by the actions, including mistakes, of his attorney unless the incompetence is such as to make farcical, the proceedings. As stated by the United States Court of Appeals for the District of Columbia in *Diggs v. Welch* (C. A. D. C., 1945), 148 F. 2d 667:

> "It is clear that once competent counsel is appointed his subsequent negligence does not deprive the accused of any right under the Sixth Amendment. All that amendment requires is that the accused shall have the assistance of counsel. It does not mean that the constitutional rights of the defendant are impaired by counsel's mistakes subsequent to a proper appointment."

The Constitution guarantees an accused in a criminal case the right to the assistance of counsel for his defense. He is not guaranteed the best counsel or the wisest, or the most experienced, or the most capable. He may not

insist upon a legal wizard or miracle worker, but must be content with an average competent counsel of the community. This appellant received, at the very least. He claims that counsel told him a guilty plea would result in probation, but it is apparent that in this respect either counsel or appellant was in error. As a result of this misundertanding, which may or may not have prompted his plea, appellant now indulges in the all too common practice of making counsel the scapegoat and, by such stratagem, attempting to avert the consequences of his own act. This court recently commented on this practice in *Latimor v. Cranor* (9th Cir., 1954), 214 F. 2d 926, wherein Judge Denman stated:

> "The application alleges that Latimor's attorney mishandled his case. This is a frequent contention of unsuccessful defendants. There are no allegations showing the attorney's conduct was so incompetent that it made the case a farce, requiring the court to intervene on his client's behalf."

See also—

Strong v. Huff (C. A. D. C., 1945), 148 F. 2d 692;

Jones v. Huff (C. A. D. C., 1945), 152 F. 2d 14;

United States ex rel. Mitchell v. Thompson (1944), 56 Fed. Supp. 683.

Likewise in the instant case, there is nothing in the record which would make the case so farcical as to warrant intervention by this Honorable Court on behalf of the appellant.

VII.

The District Judge Did Not Abuse His Discretion by Refusing to Allow Appellant to Withdraw His Plea of "Guilty," and Enter a Plea of "Not Guilty."

Appellant next contends that ". . . his constitutional right was denied . . . by the presiding Judge, to withdraw his 'guilty' plea, through a court proceeding to prove his innocence of the charges." A motion to change a plea is, of course, addressed to the sound discretion of the trial judge. There is nothing before this Honorable Court which would support appellant's apparent view, that in denying the attempt to change the plea the trial judge abused his discretion. On the contrary, a brief review of the minute orders discloses a course of vacillation, tergiversation and delay on the part of the appellant, as could only logically result in the action taken by the trial judge. Thus, on September 6, 1955, appellant was arraigned before Judge Byrne and pleaded not guilty to Counts One and Two of the indictment [Clk. Tr. 3].

On October 11, 1955, the case was set for trial before Judge Westover, at which time Mr. Dunham moved that a psychiatrist be appointed to examine the defendant. The motion was granted and the cause continued until November 8, 1955 for trial [Clk. Tr. 4].

On November 8, 1955, the case came on for trial, at which point Mr. Dunham informed the court that the defendant wished to change his plea to Count Two of the indictment. The court granted appellant permission to withdraw his plea of not guilty and enter a plea of guilty to Count Two. The cause was then continued until November 28, 1955, for probation report, for sentence and for disposition of Count One [Clk. Tr. 7].

On November 28, 1955, the cause came on for sentence, whereupon, attorney Dan O'Neill, for appellant, informed the court that defendant wished to withdraw his guilty plea to Count Two of the indictment. The Judge continued the case to December 5, 1955, for further proceedings regarding change of plea, and sentence [Clk. Tr. 8].

On December 5, 1955, the cause came on for sentencing on Count Two and disposition of Count One. Mr. Dunham stated to the court that defendant desired to withdraw his plea of guilty to Count Two of the indictment, and also to obtain other counsel [Clk. Tr. 9]. The case was continued until December 19, 1955.

On December 19, 1955, in proceedings for sentence on Count Two and disposition of Count One, Mr. Dunham stated that appellant wished to withdraw his plea of guilty to Count Two, and to obtain other counsel. After discussion between the court, defendant, and counsel, the court denied the request to change plea, and imposed sentence on Count Two at three years imprisonment. On motion of the Government, Count One was dismissed [Clk. Tr. 10].

The foregoing shows a calculated attempt by the appellant to delay sentence in every way possible. These tactics were properly called to the attention of the court by Mr. Hicks, Assistant United States Attorney, when he stated (according to appellant (Br. 12)), "the petitioner was not trying to get any (new) attorney, whatsoever, for his defense; the Government cannot wait any longer. I hereby make motion to this court to impose the sentence on this 'defendant petitioner'." Although appellant claims by this statement, Mr. Hicks "has committed *Perjury and Prejudice* . . . upon the petitioner," it

is submitted that in the attendant circumstances such representation was entirely proper and that, in granting this motion, the District Judge exercised his lawful discretion in the only reasonable manner in which he could, in the circumstances. Certainly, nothing appears in this record which would indicate the contrary.

VIII.

The Record Before This Honorable Court Does Not Indicate That Appellant Offered to Plead Guilty to Any Other Count Than the Count to Which His Plea of Guilty Was Accepted.

Appellant next contends that his detention is illegal, inasmuch as he actually intended to plead guilty to Count One, rather than Count Two (the count on which he was sentenced). Accordingly, the court allegedly erred in sentencing him on Count Two. Nor can he be sentenced on Count One (the count he allegedly intended to plead guilty to), because the Government has subsequently moved for the dismissal of that count. Appellant therefore alleges the illegality of his detention.

This specification as, in common with many of the specifications hereinbefore discussed, the fatal failing that it finds no basis in the record presently before this Court, but instead is based upon supposition, conjecture and surmise, as well as the appellant's undisclosed intent and unwarranted assumptions. It is well settled in this, and other courts, that the burden of showing grounds upon which a judgment should be reversed rests upon the appellant. (*Jernigan v. Southern Pacific Company* (9th Cir., 1955), 222 F. 2d 245, 248; *Donaher v. United States* (8th Cir., 1950), 184 F. 2d 673.)

Since evidence not in the record cannot be considered by an appellate court, the appellant has the duty to furnish the appellate court with a record which contains the alleged error. In absence of a proper record, a Court of Appeals can only assume that the court below acted properly, and indulge all presumptions in favor of the validity of the judgment.

See

In re Chapman Coal Co. (7th Cir., 1952), 196 F. 2d 779, 785, and Note 6, pages 248-249, in *Jernigan v. Southern Pacific Company* (1955), 222 F. 2d 245, *supra.*

Since appellant's many allegations are not sustained by the record as docketed herein, he has failed in his duty to point out where in the record the complained of errors exist.

IX.

It Was Not Previously Brought to the Attention of This Honorable Court That Judge Westover Had Denied Appellant's Motion to Proceed in Forma Pauperis, and Had Certified in Writing That the Instant Appeal Was Not Taken in Good Faith.

While this point obviously is original, and not in response to the specifications contained in the appellant's brief, the Government would like to bring it to the attention of this Honorable Court at this time.

On March 17, 1956, this Honorable Court granted appellant's motion for permission to proceed on this appeal *in forma pauperis.* No notice was given the Government of appellant's intention to seek such an order from this court. Had the Government been apprised of appellant's intentions, it could have called to the attention of the

court, Judge Westover's order of February 23, 1956 [Clk. Tr. 20], which reads as follows:

> "I, Harry C. Westover, hereby certify that, in my opinion, the appeal sought to be taken in the above-entitled cause from the order of the court entered January 9, 1956, is without merit and is not taken in good faith.
>
> "The motion of the petitioner for leave to appeal *in forma pauperis,* is, therefore, denied under the provisions of Title 28, Section 1915 of the United States Code."

It is established by such cases as—

Stanley v. Swope (9th Cir., 1938), 99 F. 2d 308;

Brown v. Johnston (9th Cir., 1938), 99 F. 2d 760;

Waley v. Johnston (9th Cir., 1939), 104 F. 2d 760; and

Holiday v. Johnston (9th Cir., 1941), 123 F. 2d 867,

that under 28 U. S. C., Sec. 1915, when the trial court certifies in writing that in its opinion the appeal is not taken in good faith, this court has no authority to allow an appeal to be prosecuted *in forma pauperis.*

However, inasmuch as this appeal has proceeded to the "brief" stage, the Government has no desire to vacate this court's order at this time, but raises the question for the information of the court and to dispel any inferences resulting from a belief that the trial court, by seemingly failing to certify as per 28 U. S. C., Sec. 1915, had, in effect, condoned the substantiality of the issues raised on appeal.

Conclusion.

For the views expressed above, and especially for the failure of appellant to docket a record in which the complained of errors are apparent, the Government urges that the judgment of conviction appealed from be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division,

THOMAS H. LUDLOW, JR.,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.